United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

76-2169

To be argued by
JONATHAN J. SILBERMANN

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

THOMAS PERRY,

Petitioner-Appellant,

-against-

LEON J. VINCENT, Superintendent,
Greenhaven Correctional Facility,

Respondent-Appellee.

Doc. No. 76-2169

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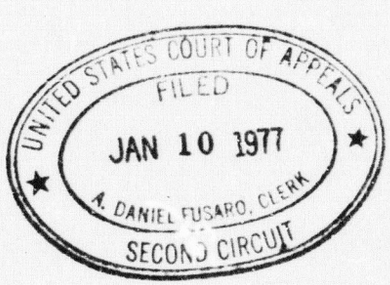
P/S

BRIEF FOR APPELLANT

ON APPEAL FROM AN ORDER
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK



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CONTENTS

Table of Cases ii

Question Presented 1

Statement Pursuant to Rule 23(a)(3)

Preliminary Statement 2

Statement of Facts

A. The Indictment 2

B. The plea proceeding of March 6, 1972 3

C. The plea proceeding of March 13, 1972 6

D. Appellant's habeas corpus application 7

Argument

The failure to advise appellant of the constitutional rights waived by a plea of guilty renders the plea constitutionally infirm 9

Conclusion 14

TABLE OF CASES

Boykin v. Alabama, 395 U.S. 238 (1969) 7, 9, 10, 12, 13

Brady v. United States, 397 U.S. 742 (1970) 12

Caputo v. Henderson, 541 F.2d 979 (2d Cir. 1976) 12

Carafas v. La Vallee, 391 U.S. 234 (1968) 7

Carnley v. Cochran, 369 U.S. 506 (1962) 10

Duncan v. Louisiana, 391 U.S. 145 9

Henderson v. Morgan, 44 U.S.L.W. 4910 (Sup. Ct. June 17, 1976) 10

In re Winship, 397 U.S. 358 (1971) 10

Kelleher v. Henderson, 531 F.2d 78 (2d Cir. 1976) 11, 12

Kloner v. United States, 535 F.2d 730 (2d Cir.), cert. denied 45 U.S.L.W. 3345 (Sup. Ct. November 8, 1976) 8, 12, 13

Leblanc v. Henderson, 478 F.2d (5th Cir. 1973) 10

Malloy v. Hogan, 378 U.S. 1 9

McCarthy v. United States, 394 U.S. 459 (1969) 12

North Carolina v. Alford, 400 U.S. 25 (1970) 11

People v. Rizer, 95 Cal. Reptr. 23, 484 P.2d 1367 (1971) 12

Pointer v. Texas, 380 U.S. 400 9

Todd v. Lockhart, 490 F.2d 626 (8th Cir. 1974) 10

United States v. Gearin, 396 F.2d 691 (5th Cir. 1974) 10

United States v. Journet, Docket No. 76-1285, slip op. 371 (2d Cir. November 1, 1976) 10, 11, 13

OTHER AUTHORITIES

Title 28, U.S.C. §2241 et seq. 7

Federal Rules of Criminal Procedure, Rule 11

(as amended December 1, 1975) 10, 11

N.Y. Penal Law

§110 3

§265.05(2) 2, 3

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

THOMAS PERRY, Petitioner-Appellant, -against- LEON J. VINCENT, Superintendent, Greenhaven Correctional Facility, Respondent-Appellee.	Doc. No. 76-2169

BRIEF FOR APPELLANT

ON APPEAL FROM AN ORDER
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

QUESTION PRESENTED

Whether the failure to advise appellant of the constitutional rights waived by a plea of guilty renders the plea constitutionally infirm.

STATEMENT PURSUANT TO RULE 23(a)(3)

Preliminary Statement

This is an appeal from an order of the United States District Court for the Eastern District of New York (The Honorable Thomas C. Platt) entered on October 14, 1976, denying without a hearing appellant's petition for a writ of habeas corpus.

The Legal Aid Society, Federal Defender Services Unit, was continued as counsel on appeal pursuant to the Criminal Justice Act.

Statement of Facts

Appellant Perry was convicted in New York State Supreme Court of attempted possession of a weapon and sentenced to a term of four years' imprisonment.

A. The Indictment

An indictment, filed in Queens County Supreme Court, charged appellant with possession of a weapon as a felony and menacing.*

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*Possession of a weapon as a felony was a Class D felony as defined by the then-applicable New York State Penal Law §265.05(2). The count of the indictment charging this offense accused petitioner of "unlawfully possess[ing] a loaded pistol, said possession not taking place in the defendant's home or place of business." Menacing is a Class B misdemeanor.

B. The plea proceeding of March 6, 1972*

On March 6, 1972, appellant's counsel made an application to withdraw appellant's plea of not guilty and to enter a guilty plea to attempted possession of a weapon as a felony in satisfaction of both charges in the indictment.** In response to questioning by the court, appellant acknowledged knowing that his attorney could not plead guilty for him, that no promises had been made about the sentence to be imposed (M.13-14), and that he could be sentenced to a term of imprisonment of four years (M.14-15).

Appellant was then asked about the events leading to his arrest. Appellant stated that on October 1, 1971, at approximately 1:00 a.m., he was driving a metered taxicab at Kennedy International Airport. He drove to the cab queue (M.15-16). Appellant told the court:

> I came to the line. I seen some people over there. They were talking, so I pulled up... There are three cabs sitting in front of me. I says, 'Well," when I stepped outside of the cab. I said, "Is anything coming out of the airport, like the plane that came in?" They said, "No." I said, "O.K." By that time, I pulls off. The next thing I know the police officer pulls up by me and is

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*The transcript of these proceedings is reproduced as "B" to appellant's separate appendix. Numerals in parenthesis preceded by "M" refer to pages of this transcript dated March 6, 1972.

**Attempted possession of a weapon as a felony was a Class E felony. N.Y. Penal Law §§110; 265.05(2). The maximum term of imprisonment for this offense was four years.

asking me to pull over. I pulled over. He gets out. He says, "Somebody said you pulled a weapon on him around the corner." I said, "I pull a weapon? What are you talking about? A weapon?" He said, "Do you have a weapon on you?" I said, "No." He said, "Get out of the car." I stepped out of the car. He said, "Stand by the fender." He took me there. He said, "Do you have anything on you?" He searched me. He went back to the car. He came out with a weapon. He said, "You are under arrest." That was it.

(M.16-17).

The following colloquy then occurred:

THE COURT: Whose weapon did he come up with?

THE DEFENDANT: It wasn't mine. I don't know.

THE COURT: You know nothing about this weapon?

THE DEFENDANT: I had ten or fifteen people in the car that night.

THE COURT: You didn't know that that revolver was in the cab?

THE DEFENDANT: (No answer).

[DEFENSE COUNSEL]: You knew that the revolver was in the cab? The Judge asked you? You have to answer the Judge.

THE COURT: Did you know that the revolver was there?

THE DEFENDANT: Yes. I knew the revolver was there.

THE COURT: Did you put it there?

THE DEFENDANT: No.

THE COURT: Who put it there?

THE DEFENDANT: I don't know.

THE COURT: But you knew it was there.

THE DEFENDANT: Yes.

THE COURT: When did you find out it was there, Perry?

THE DEFENDANT: Your Honor, can I --

THE COURT: Let me tell you something, Perry. We do not take any pleas from the innocent in this courtroom. If you are innocent of this charge, we are going to trial on the charge. If you want to plead guilty, then you have to tell me the facts that led up to the arrest. Now, from what you have told me now, you are innocent of these charges, and I won't take your plea. What do you want to do?

THE DEFENDANT: Your Honor, can I say something? The weapon was put there. I know who put it there. It wasn't my weapon. That's what I am trying to tell you. That's why I pleaded guilty.

THE COURT: When did you know that the weapon was there?

THE DEFENDANT: Well, actually when I left the airport terminal.

THE COURT: Do you mean just before you were arrested?

THE DEFENDANT: Right.

THE COURT: The weapon was put there then?

THE DEFENDANT: Yes.

(M.17-20).

The judge found that appellant had not admitted facts constituting a crime (M.19) and refused to accept the guilty

plea. He scheduled a date for trial.

C. The plea proceeding of March 13, 1972

On March 13, 1972, appellant again sought to plead guilty. He admitted that the loaded gun found in the taxicab was his and that he had put it there (P.3; 7*). Appellant again acknowledged knowing that his lawyer could not plead guilty for him but that only he could enter a plea of guilty; that he faced a maximum sentence of four years' imprisonment; and that no promises had been made concerning the sentence to be imposed (P.4-5). The court then accepted appellant's plea to the crime of attempted possession of a weapon as a felony (P.7).

On April 27, 1972, the court sentenced appellant to an indeterminate term of incarceration of four years, the maximum sentence allowed under State law. Appellant then requested that his guilty plea be withdrawn. The court denied this application.

During these proceedings, the State judge failed to inform appellant of any of the constitutional rights which were waived by appellant's guilty plea. Specifically, appellant was

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*Numerals in parentheses preceded by "P" refer to pages of the transcript of the plea proceedings on March 13, 1972. The transcript of these proceedings is reproduced as "C" to appellant's separate appendix.

not told that he had a right to a jury trial, a right not to incriminate himself, and a right to confront his accusers, and that the burden of proving guilt beyond a reasonable doubt rested with the State.

Appellant's conviction was affirmed without opinion by the Appellate Division, Second Department on February 25, 1974. Leave to appeal to the Court of Appeals was denied on April 17, 1974.*

D. Appellant's habeas corpus application**

On August 30, 1974, appellant filed a petition for writ of habeas corpus pursuant to 28 U.S.C. §2241 et seq., seeking vacatur of his guilty plea. In his petition and supporting papers, appellant argued, inter alia, that the state court judge's failure to advise appellant of any of the constitutional protections he was waiving by his plea rendered the resulting

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*On his appeals in the State courts, appellant argued, inter alia, that his plea was not knowingly and voluntarily entered and was thus a violation of Boykin v. Alabama, 395 U.S. 238 (1969), and due process. Appellant's brief at 15-16, filed as part of appellant's habeas corpus application (see Rec. on Appeal, Doc. No. 1). Appellant has exhausted his available State remedies, and the District Court here so held. See appellant's appendix D at 3.

**The habeas corpus petition was filed while appellant was on parole. Subsequent to its filing, appellant was unconditionally released from custody. As the District Court held, (appendix D at 3), since jurisdiction attached while petitioner was in custody, the case is not moot. See Carafas v. La Vallee, 391 U.S. 234 (1968).

conviction constitutionally infirm. In support of his application, appellant filed an affidavit (Rec. on Appeal, Doc. No. 10), in which he stated that he was never told by anyone, including his lawyer, that he had a right to a jury trial, a right not to incriminate himself, a right to confront those individuals who accused him of the crime or that the burden of proving his guilt beyond a reasonable doubt rested with the State. Further, appellant indicated that he neither understood those rights nor did he realize that by pleading guilty he was waiving them. Indeed, appellant stated that if he had known this information, he would not have pleaded guilty (Affidavit of Thomas Perry, Rec. on Appeal, Doc. No. 10). A hearing was not held on this question.

In an opinion dated October 14, 1976*, Judge Platt denied appellant's application for a writ of habeas corpus. Relying heavily on this Court's decision in Kloner v. United States, 535 F.2d 730 (2d Cir.) cert denied 45 U.S.L.W. 3345 (November 8, 1976), the District Court found, that despite the state court's failure to inform appellant of the various rights waived by a guilty plea, appellant's plea, "considering all of the relevant circumstances" was voluntary (appendix D at 6).

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*The District Court's opinion is "D" to appellant's separate appendix.

ARGUMENT

THE FAILURE TO ADVISE APPELLANT OF THE CONSTITUTIONAL RIGHTS WAIVED BY A PLEA OF GUILTY RENDERS THE PLEA CONSTITUTIONALLY INFIRM.

The record in this case shows that appellant was not told during either of the plea proceedings that he possessed constitutionally guaranteed rights, which would be forfeited by entry of a guilty plea:

> Several federal constitutional rights are involved in a waiver that takes place when a plea of guilty is entered in a state criminal trial. First, is the privilege against compulsory self-incrimination guaranteed by the Fifth Amendment and applicable to the States by reason of the Fourteenth. Malloy v. Hogan, 378 U.S. 1. Second, is the right to trial by jury. Duncan v. Louisiana, 391 U.S. 145. Third, is the right to confront one's accusers. Pointer v. Texas, 380 U.S. 400.
>
> Boykin v. Alabama, 395, U.S. 238, 243 (1969).

Furthermore, the record shows that the court's failure to supply the requisite advice was not cured by appellant's having received the information from some other source. These facts establish that the plea was not entered intelligently. Accordingly, it was violative of the Constitution and the writ should have been granted. Boykin v. Alabama, 395 U.S. 238, 242 (1969).

The waiver of various constitutional rights*, which cannot be presumed from a silent record, is required if a plea is to comply with the requirements of due process. Boykin v. Alabama, supra 395 U.S. at 243; Henderson v. Morgan, 44 U.S.L.W. 4910, 4192 n.13 (June 17, 1976); see also, Carnley v. Cochran, 369 U.S. 506, 516 (1962); compare United States v. Gearin, 396 F.2d 691, 695 (5th Cir. 1974); Leblanc v. Henderson, 478 F.2d 481 (5th Cir. 1973); Todd v. Lockhart, 490 F.2d 626, 628 (8th Cir. 1974). The Supreme Court has only recently reaffirmed this principle, conditioning the validity of a guilty plea upon a specific understanding of the constitutional protections waived by the plea. Henderson v. Morgan, supra, 44 U.S. L.W. at 4192 n.13.

In United States v. Journet, Docket No. 76-1285, slip op. 371 (2d Cir. November 1, 1976), a case decided under Rule 11 of the Federal Rules of Criminal Procedure (as amended as of December 1, 1975), this Court made specific reference to the required constitutional standard. Referring to the legislative history of Rule 11, the Court concluded that the Rule was a codification of advice already required by Boykin v. Alabama to

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*As a requirement of constitutional law, appellant should have been told that he had a right against compulsory self-incrimination, a right to a jury trial, a right to confront his accusers, and, additionally, that the burden of proving guilt beyond a reasonable doubt rested with the State. See In re Winship, 397 U.S. 358 (1971).

meet the constitutional requirements of waiver (United States v. Journet, supra, slip op. at 376) and stated that the record must "demonstrat[e] that the defendant was 'sufficiently aware of the consequences of and alternatives to his guilty plea to render his plea a voluntary and intelligent one.'" United States v. Journet, supra, slip op. at 375; see also, Kelleher v. Henderson, 531 F.2d 78, 81 (2d Cir. 1976); North Carolina v. Alford, 400 U.S. 25, 31 (1970).

Here, appellant was never informed of any of the protections waived by his plea of guilty. Although appellant was advised during the first proceeding on March 6, 1972, that if he was innocent, he would go to trial (M.19), appellant was never informed of his constitutionally protected right to have his trial before a jury -- the critical component of the right to trial*. Nor was he told of the Government's burden, or of his right to remain silent or his right to confront his accusers.

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*Compare Federal Rule 11(c). This rule not only requires that a defendant be informed of his right to a jury trial, but also that no further trial of any kind would be held. By this procedure, the Rule attempts to avoid any possible confusion involved even after a waiver of a trial by jury. In that situation a defendant may be under the mistaken impression that some kind of trial will follow. See United states v. Journet, supra, slip op. 378 n.5.

Not only was the appellant not advised of his rights, but clearly this omission made a difference to the appellant's choice. Kelleher v. Henderson, supra, 531 F.2d at 82; Caputo v. Henderson 541 F.2d 979, 984 (2d Cir. 1976). The record shows that if appellant had known of his rights and of the impact of his plea on them, he would not have then entered his guilty plea (Affidavit of Thomas Perry, Rec. on Appeal, Doc. No. 10).

To deny the petition in this case, the District Court relied on Kloner v. United States, 535 F.2d 730, 733 (2d Cir.) cert. denied 45 U.S.L.W. 3345 (November 8, 1976) decided under Rule 11 of the Federal Rules of Criminal Procedure prior to its 1975 amendment .* However, to the extent that Kloner is a

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*The District Court also relied on Brady v. United States, 397 U.S. 742 (1970), to narrow the meaning of Boykin (appendix D at 6). However, Brady did not address itself to the issue raised here, but to the question of whether a plea was voluntary if entered to avoid a death penalty later deemed to be invalid. To the extent that Brady is relevant, it requires that the record disclose that the plea was entered voluntarily and understandingly (397 U.S. at 747 n.4) and with a full understanding of the consequences of a plea (397 U.S. at 748-749 n.6), citing to Boykin v. Alabama, supra, and McCarthy v. United States, 394 U.S.459 (1969). See People v. Rizer, 95 Cal. Reptr. 23, 484 P.2d 1367, 1372 n.4 (1971).

constitutional ruling, it has been implicitly overruled in Journet, decided after Kloner, since Journet recognizes that Boykin v. Alabama requires the waiver of rights as a matter of constitutional law, while Kloner does not.* United States v. Journet, supra, slip op. at 376. Thus, the Court in Kloner found that the defendant only had to know of his right to a jury trial, while Journet requires an understanding of a whole range of constitutional protections and the consequences of the plea on them.

*Moreover, Kloner is distinguishable on its facts. There, the "close participation" of Kloner's attorney in the proceedings, Kloner's educational background, and the warnings given by the district judge, all assured this Court that the plea was an intelligent and voluntary one. The record in this case reflects a totally different situation. Here, there was a complete failure of the state court judge, as well as appellant's trial attorney, to advise appellant both of the rights waived and the effect his plea had on them. Moreover, other factors relied upon by the District Court in this case -- appellant's age and the fact that appellant was the sole support for his five children, regularly employed, earning a modest salary -- are irrelevant to the critical determination of appellant's understanding of the complicated legal questions involved.

The circumstances present here render appellant's plea violative of due process, Henderson v. Morgan, supra, 44 U.S.L.W. at 4912 n.13; Boykin v. Alabama, supra, 395 U.S. 238, requiring issuance of a writ of habeas corpus.

CONCLUSION

For the foregoing reasons, the writ of habeas corpus should be granted and the judgment of conviction vacated.

Respectfully submitted,

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CERTIFICATE OF SERVICE

January 7, 1977

I certify that a copy of this brief and appendix has been mailed to the Attorney General of the State of New York.

Becky Silberman